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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

185

No. [redacted]

C. C. THOMAS, Petitioner,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS, a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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INDEX

	PAGE
I. Introduction	1
II. Reference to Opinions Below	2
III. Grounds for Jurisdiction	2
IV. Question Presented for Review	2
V. Statutes Involved	3
VI. Statement of the Case	3
VII. Grounds and Reasons for Granting the Writ	5
VIII. Conclusions	8
Appendix A — Opinion of the United States Court of Appeals, Tenth Circuit	9
Appendix B — Order Extending Time for File Petition for Writ of Certiorari	11

TABLE OF CASES

Kearney v. Case, 12 Wall. 275, 20 L.Ed. 395 (1871) 5, 6

Elliott v. Toeppner, 187 U.S. 327, 23 S.Ct. 133 (1902) 5, 6

In Re Eastern Supply Co., 197 F.Supp. 359 (W.D. Pa. 1961) 7

LEGAL PERIODICAL

Journal of National Association of Referees in Bankruptcy, April, 1960, pp. 34, 60. 7

STATUTES

Section 19 of the Bankruptcy Act, Title 11 U.S. Code 42 3

CONSTITUTIONS

Federal: Fifth Amendment 7

Seventh Amendment 6

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I. INTRODUCTION

COMES NOW the petitioner, by his attorneys, Allen A. Thoreen and Clayton H. Morrison, of the State of Colorado, and petition the Court for the issuance of a Writ of Certiorari to review a judgment of the United States Court of Appeals, Tenth Circuit, in the case of C. C. Thomas v. Youngstown Sheet and Tube Company; Webb & Knapp, Inc.; Murph's Express, a partnership;

E. T. Cressman; Peter B. Taylor; Rice's Food Store; and Dawson, Nagel, Sherman & Howard, No. 7286.

II. REFERENCE TO OPINIONS BELOW

The opinion of the Chief Referee in Bankruptcy, United States District Court for the District of Colorado, entered June 19, 1962 (R. 25-29), is not officially reported. The opinion of the United States District Court for the District of Colorado which was entered November 30, 1962 (R. 35-48) is reported at 211 F.Supp. 187. The opinion of the United States Court of Appeals, filed February 17, 1964 (Appendix A, *infra*, pp. 9-46), is not officially reported.

III. GROUNDS FOR JURISDICTION

The Statutory provisions relied upon as conferring jurisdiction on this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S. Code 1254 (1).

IV. QUESTIONS PRESENTED

Was the petitioner, as an alleged involuntary bankrupt, deprived of property rights accumulated during a lifetime, without due process of law, under the circumstances where (1) he was ordered by the Referee to proceed to trial before the Referee, although he had made written demand for trial by jury; (2) within minutes after being so ordered he again properly demanded a jury trial in writing; and, (3) finally obeyed the Referee's order and participated in the hearing before the Referee?

V. STATUTES INVOLVED

A. Section 19 of the Bankruptcy Act, Title 11 U.S. Code 42 reads as follows: (a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of Bankruptcy alleged in such petition to have been committed, upon filing a written application therefore at or before the time within which an answer may be filed. If such application is not filed within such time, the trial by jury shall be deemed to have been waived.

B. General Order 12(1), Title 11 U.S. Code, Following Section 53 reads as follows: After a general reference, all proceedings, except such as are required by the Act or the General Orders to be before the Judge, shall be had before the Referee.

VI. STATEMENT OF THE CASE.

(References are to page numbers of the consolidated record.)

This case involves C. C. Thomas, an oil and gas lease broker, hereinafter referred to as "Thomas" against whom an involuntary petition in bankruptcy was filed on August 30, 1960, by Youngstown Sheet and Tube Company, alleging that Thomas had committed two acts of bankruptcy (R. 4 and 5). On December 20, 1960, two additional creditors filed petitions to intervene and Thomas was finally served on December 23, 1960. He was ordered by the District Judge to file his Answer to the petition by December 30, 1960. After a motion to Quash the Subpoena had been heard and denied, Thomas filed his Answer on Jan-

uary 24, 1961. In that Answer he demanded a trial by jury on all issues raised by his Answer. Thereupon, on January 25, 1961, an Order of Reference was entered by the Judge of the United States District Court providing that "ORDERED that the above-entitled proceedings be referred concurrently, jointly and severally to Benjamin C. Hilliard, Jr., and J. Gordon Bartley, the Referees in Bankruptcy of this Court to take such further proceedings therein as are required and permitted by the said Bankruptcy Act, except such matters that are expressly reserved to the Judge under said Bankruptcy Act." (R. 10).

This Order was dated January 25, 1961. After intervening hearings on various matters, including the dismissal of certain creditors, the joining of others, and the striking of one allegation of the commission of an Act of bankruptcy, the matter came up before the Referee on April 5, 1962. The Referee heard the question of the qualification of the petitioning creditors and at that hearing ruled that there were sufficient qualified petitioning creditors. Whereupon, in the afternoon of April 5, 1962, the Referee ordered the parties to proceed to trial of the issue of the commission of the Act of bankruptcy. Thomas thereupon again filed his written demand for a trial by jury (R. 30) in his Amended Answer, having already done so in his original Answer. The petitioning creditors proceeded and Thomas participated in the hearings. The hearings continued to completion on April 6, 1962, and on June 19, 1962, the Referee ruled that Thomas had committed an Act of bankruptcy (R. 164). Thomas petitioned the District Judge for a review of the Referee's Order (R. 168). The District Judge, on November 30, 1962 concluded that the Referee's ruling was correct in all respects, including his order that he had jurisdiction and was auth-

orized to hear the matter of the commission of the act of bankruptcy. The District Court held that Thomas, by failing to enter objection and participating before the Referee waived his right to a jury trial (R. 190-192). The United States Court of Appeals affirmed the judgment on February 17, 1964. This Court, upon motion by the petitioner, extended the time to file the Petition for Writ of Certiorari to June 15, 1964. (Appendix B, p. 11).

VII. GROUNDS AND REASONS FOR GRANTING THE WRIT

Your petitioner submits that he has been deprived of property rights without due process of law, in a case which comes within the provisions of Rule 19(1)(a) of this Court in that the decision of the Tenth Circuit concerns a Federal question of substance, where a Court of Appeals has affirmed a decision in conflict with applicable decisions of this Court. Specifically, on the question of waiver of jury trial, the District Court relied upon the case of *Kearney v. Case*, 12 Wall. 275, 20 L.Ed. 395 (1871). In that case, this Court stated that "where a party is present by Counsel and goes to Trial before the Court without objection or exception, he has voluntarily waived his right to a jury and must be held in this Court to the legal consequences of such a waiver."

However, in *Elliott v. Toeppner*, 187 U.S. 327, 23 S. Ct. 133 (1902), a later case which applies specifically to the matter of Section 19(a) of the Bankruptcy Act, it is stated that "The right to a trial by jury, on written application thus given (by the Act) is absolute and cannot be withheld at the discretion of the Court. In that respect

it differs from the trial of an issue out of Chancery, which the Court of Equity is not bound to grant."

The decision in this case is squarely in conflict with the decision in *Elliott v. Toeppner, supra;* and with the Seventh Amendment to the Constitution of the United States which guarantees a jury trial "in suits at Common law where the value in controversy shall exceed twenty dollars;" and, the decision is in conflict with Section 19(a) of the Bankruptcy Act which guarantees a jury trial when demanded by written application. The decision of the District Court citing *Kearney v. Case, supra,* is especially in conflict with present Federal Rules of Civil Procedure. When the *Kearney* decision speaks of waiver in terms of failure of Counsel for bankrupt to utter objection or exception, it takes no note of that history which gave birth to Equity Rule 46 which provided that the rules of common law relating to exceptions to rulings of the Court were inapplicable to Equity proceedings. Compare it to the happy language in Rule 46 of the Federal Rules.

The effect of the Referee's order that the matter of the examination of the Act of bankruptcy be heard before him deprived Thelma of his property. As an oil and gas lease broker, he thereupon became unable to deal with his property for all titles were clouded. He stands financially incapacitated because the record does not reflect an uttering of his Counsel to the effect that "we object." He should be able to rely on the Rule of absolute right to a jury trial, having again demanded a jury trial in the Amended Answer, and not be held to the Referee's arbitrary order.

In view of the rising tide of bankruptcy cases which shows no signs of subsidence, it is of paramount importance that the Supreme Court of these United States define the question of the Authority of the judicial function to the Referee.

The practice has been that only judges conduct jury trials, not Referees. In *Re Eastern Supply Co.*, 197 F. Supp. 850 (W.D. Pa. 1961). Recently however, jury trials have been conducted by Referees (See 34 Journal of National Association of Referees in Bankruptcy, April, 1960 and Editorial Comment at page 60) and now, in the present Thomas case, a Referee has decided the alleged involuntary bankrupt should have no trial by jury.

The matter of Referees assuming the jury function has come to the attention of the Judicial Conference and it has been discussed by the Bankruptcy Committee of the Judicial Conference. It is the view of the Committee that if the Referee has the power to conduct jury trials, the Court is not required to and cannot control that function. The Committee thought and made the decision that it (the jury trial) should be held before the Referee. And if an alleged bankrupt is to be given due process of law, must it not be done within the framework of the Bankruptcy Act? Thus, there is present the bewildering issue of protection under the terms of the Fifth Amendment which provides that a man shall not be deprived of his property without due process of law.

VIII. CONCLUSIONS

The foregoing statements and decisions raise serious questions as to the correctness of the Thomas decision in the Tenth Circuit. Further, it is of utmost importance that this Court undertake a detailed review of the case as to the points raised herein and the broad ramifications of the principals involved in permitting a Referee to deprive a litigant of a jury trial. Wherefore your petitioner prays that this petition for Writ of Certiorari be granted so that the injustice done can be corrected.

Respectfully submitted,

[redacted]

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7286 — January Term, 1964

[redacted]

February 17, 1964

Alba A. Pinnock and Clayton H. Morrison for Appellant.

Richard H. Shaw, of Modesitt and Shaw, for Appellee Youngstown Sheet & Tube Company.

Gerald M. Quiat, of Quiat, Seeman, Quiat & Woods, for Appellee Wehr & Knapp, Inc.

No appearance for other Appellees.

Before BREITENSTEIN and HILL, Circuit Judges, and KERR, District Judge.

PER CURIAM.

A careful examination of the record in this case and consideration of the briefs and arguments of the parties convince us that the findings and decision of the district court were correct. Accordingly, the judgment is affirmed on the basis of that court's opinion reported in 211 F. Supp. 187.

APPENDIX B

Supreme Court of the United States

No. ..... *October Term,* 1963

C. A. THOMAS, Appellant,

vs.

YOUNGSTOWN SHEET & TUBE COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

June 15 , 1964.

Byron R. White
Associate Justice of the
Supreme Court of the
United States.

Dated this 23rd

day of April , 1964